

## Instructions for Documentation of Waivers, Exceptions, and Modifications for Lease Stipulations and Conditions of Approval

Waivers, Exceptions, and Modifications (WEMs) provide an effective means of applying “Adaptive Management” techniques to Fluid Minerals leases and associated permitting activities to meet changing circumstances for Oil and Gas Applications for Permit to Drill (APDs) and Geophysical Notices of Intent. The Bureau of Land Management (BLM) criteria for approval of WEM requests should be supported by National Environmental Policy Act (NEPA) analysis, either through the land use planning process or site-specific environmental review.

**NOTE:** While the term “lease stipulation” is used frequently in this document, it should be noted that the concepts contained within this policy can also be applied with some adaptation to Conditions of Approval (COAs). An exception request can be for either a lease stipulation that would be applied as a COA because the resource exists in the site-specific location of the permit, or as an attached COA that does not exist in a lease stipulation for the permitted location. Where WEM criteria are not identified in the Resource Management Plan (RMP), they should be outlined in the COAs and analyzed and described in the site-specific NEPA document.

### Terms Defined:

- A **Condition of Approval** means a site-specific and enforceable requirement included in an approved APD or Sundry Notice that may limit or amend the specific actions proposed by the operator. COAs minimize, mitigate, or prevent impacts to resource values or other uses of public lands.
- A **Lease Stipulation** is a condition of lease issuance that provides a level of protection for other resource values or land uses by restricting lease operations to a greater extent than standard lease terms or regulations. A stipulation is an enforceable term of the lease contract, supersedes any inconsistent provisions of the standard lease form, and is attached to and made a part of the lease. Lease stipulations further implement the BLM’s regulatory authority to protect resources or resource values. Lease stipulations are developed through the land use planning process.
- An **Exception** is a one-time exemption for a particular site within the leasehold. Exceptions are determined on a case-by-case basis; the stipulation continues to apply to all other sites within the leasehold. An exception is a limited type of waiver.
- A **Modification** is a change to the provisions of a lease stipulation, either temporarily or for the term of the lease. Modifications can either be requested at the APD level, on a portion of the lease, or for the entire lease. Depending on the specific modification, the stipulation may or may not apply to all sites within the leasehold to which the restrictive criteria are applied.
- A **Waiver** is a permanent exemption from a lease stipulation for the lease. Waiver requests are made for the entire lease term.
- **Substantial** (in the context of an WEM having a “substantial” effect) means an important, considerable, consequential, major, or meaningful effect on the environment that was not previously considered, thus requiring public notification (30-day public review) of a lease term or stipulation (43 CFR 3101.1-4).

### **What are the criteria for granting a WEM request?**

A WEM must be based on one of two criteria. According to 43 CFR 3101.1-4, “A stipulation included in an oil and gas lease shall be subject to modification or waiver only if the authorized officer [AO] determines that the factors leading to its inclusion in the lease have changed sufficiently to make the protection provided by the stipulation no longer justified or if the proposed operations would not cause unacceptable impacts.”

### **What are some examples for granting lease WEMs where the factors leading to its inclusion in the lease have changed sufficiently to make the protection provided by the stipulation no longer justified?**

In the following example, circumstances have changed and there are no expected impacts from granting a WEM request:

Example #1: The lease stipulation requires elk crucial winter range avoidance from November 15 through April 15.

- A one-time **exception** to this type of seasonal restriction could be granted if a mild winter were occurring and the elk left their crucial winter habitat early.
- A **modification** could be granted if it were determined the elk have changed their migration patterns and are not entering the area until mid-December, thus justifying a change in the start of the seasonal constraint to December 15.
- A **waiver** could be granted for the entire lease term if it were determined elk no longer use the area for crucial winter range.

### **What are some considerations in granting lease WEM requests where the proposed operations would not cause unacceptable impacts? How do we identify what impacts are acceptable?**

WEM requests may also be granted when the AO determines that impacts will be acceptable. This determination should be fully documented in the case file with an appropriate level of environmental review and made on a case-by-case basis after asking not one, but a series of questions, such as:

- Would the BLM remain in compliance with laws and regulations, including the “unnecessary or undue degradation” standard in the Federal Land Policy and Management Act?
- Is the proposal in conformance with the objectives of the RMP?
- What would be the level of harm to the protected resource, both locally and regionally?
- What would be the economic or public safety concerns if an active operation near completion was shut-in to comply with a seasonal closure? For example: economic, multi-stage fracturing not completed; safety, casing and cementing of freshwater zones not completed.
- Are the impacts temporary, rather than long term?
- Is the resource being protected rare, or is it relatively common? Is it a special status species?
- Based on existing knowledge of a species and its use of an area, would impacts be confined to single or a small number of individuals, or would there be impacts on local or regional populations? Would impacts be allowed under existing law and policy?

- Can the impacts be reduced to an acceptable level through additional mitigation measures, including intensive use of environmental Best Management Practices (BMPs)?

In the following example, impacts will result from granting an exception or waiver, but the impacts are determined by the AO to be acceptable.

Example #2: The lease stipulation requires elk crucial winter range avoidance from November 15 through April 15.

- An **exception or waiver** to this type of seasonal restriction could be granted to allow year-round drilling if the long-term viability of the elk population would not be affected. This conclusion could be reached by the AO in coordination with potentially interested agencies, such as the State wildlife agency, if an environmental review (energy and environmental cost/benefit analysis) indicates that disturbance or displacement of the elk during drilling is acceptable.
- Acceptability may be based on considerations such as:
  - The availability of suitable habitat nearby and intensively drilling year-round to shorten the overall drilling time period in the habitat vs. multiple years of seasonal drilling.
  - Staged development with intensive development in one defined habitat area followed by reclamation, prior to moving development into the next habitat area.
  - Economic, environmental, or social costs of moving large drilling operations into and out of the defined area on a seasonal basis for multiple years.
  - Use of additional mitigation, such as environmental BMPs that reduce the short-term impacts of drilling on the elk. Appropriate BMPs might include the use of quieter drilling rigs or noise abatement, locating the well pad and access road behind a ridge, use of bus or van transportation for all employees, limitations on hours of operation, or placing restrictions on the use of certain roads.

### **How does the process differ for making changes to a leasing decision/stipulation in the land use plan vs. granting a WEM after the lease has been issued?**

Areas open to leasing, along with their applicable lease stipulations, are identified in the Land Use Plan, typically the RMP for the Field Office. Lease stipulations can be added, deleted, or modified within the RMP through the plan maintenance or amendment processes. The guidance provided in the Land Use Planning Handbook H-1601-1, Section VI (H) (Maintenance) and Section VII (B)(Amendment), further explains how and when leasing decisions/stipulations may be added, deleted, or modified in the RMP

After the lease has been issued, changes to the requirements of the lease stipulation are made through the WEM process. The criteria used for granting WEMs after lease issuance are generally the same criteria used for modifying stipulations in the RMP prior to issuance of the lease.

### **The Process for Reviewing and Approving a Waiver, Exception, or Modification to a Stipulation on a Lease That Has Been Issued**

Once the lease is issued, use the following process if:

1. The WEM criteria were analyzed and are specified in the RMP/Environmental Impact Statement (EIS);

2. The criteria have been met; and
3. There is no significant new information bearing on the environmental effects. (See, BLM H-1790-1, Chapter III, Using Existing Environmental Analysis; and 2007 Onshore Oil and Gas Order Number 1, XI. Waivers, Exceptions, or Modifications):
  - The AO generally requires the operator to submit a written request for a WEM and information demonstrating that (1) the factors leading to the inclusion of the stipulation in the lease have changed sufficiently to make the protection provided by the lease stipulation no longer justified, or (2) that the proposed operation would not cause unacceptable impacts. Requests from the operator should contain, at a minimum, a plan including on-site mitigation efforts to adequately protect affected resources, data collection and monitoring efforts, and timeframes for initiation and completion of construction, drilling, and completion operations. The operator's request may be included in an APD, Notice of Staking, Sundry Notice, or letter. The BLM may also proactively initiate the process.
  - The BLM does not need to perform further environmental analysis if it is determined that the request is in conformance with the RMP/EIS. If existing NEPA analysis requires supplementation, prepare appropriate NEPA analysis.
  - During the review process, BLM coordination with other state or Federal agencies should be undertaken, as appropriate, and documented. For example, it may be appropriate to coordinate the review of wildlife WEM requests with the local office of the State wildlife agency. The BLM will also consult with the Federal surface management agency if other than the BLM.
  - The BLM staff's review and recommendations should be documented along with any necessary mitigation and provided to the AO for approval or disapproval. The applicant is then provided with a written notification of the decision. Decisions on WEM requests are subject to administrative review by the State Director and thereafter may be appealed to the Interior Board of Land Appeals pursuant to 43 CFR Part 4. However, decisions on WEMs submitted by the operator after drilling has commenced are final for the Department of the Interior and not subject to administrative review by the State Director or appeal pursuant to 43 CFR Part 4 (see Onshore Order No. 1).
  - After drilling has commenced, the BLM may consider verbal requests for, and grant verbal approvals of WEM requests. However, the operator must submit a written notice within seven (7) days after the verbal request. The BLM must also confirm verbal approvals in writing. This requirement is provided for in Onshore Oil and Gas Order No. 1. Operators should be informed that submission of verbal requests is discouraged and used only when the delay in completing the well was due to unforeseen circumstances beyond the reasonable control of the operator or a serious economic or a public health and safety problem could result from denial of the request.

Public notification (30-day public review) is generally not required for exceptions because an exception is seldom a substantial modification or waiver of a lease term or stipulation (43 CFR 3101.1-4), particularly if the exception criteria is outlined in the lease or the RMP. Nor is public review required for waivers or modifications that the AO determines are not substantial and do not substantially waive or modify the terms of the

lease. “Substantial” in this case would include the WEM having a “substantial” effect on the environment that was not previously considered. However, the applicable RMP may contain additional notification requirements. The public notice, if required, should include identification of the modified lease terms and a description of the affected lands or a map.

When Public Notice is appropriate, the following procedures may apply:

- Approval of a WEM with the APD approval: A notice describing the modified lease terms, when required, may be posted for 30 days in the Field/State Office concurrently with the posting of the APD or Notice of Staking; posted on the agency website; posted in a local paper as a legal notice or incorporated into a newspaper article; or the notice may be included as part of the NEPA document’s public review, if the NEPA document is offered for review.
- Approval after the APD has been approved: Public notice, if required, may take the form of a 30-day posting on the agency website, a legal notice or article in the newspaper, or a notice and associated public review conducted as part of the public review of a NEPA document.
- Approval after drilling has commenced: Unless specified in the RMP it is unlikely public notification would be necessary.

**Can WEM requests be approved by the AO when they are not specified or analyzed in the RMP/EIS or if there is significant new information?**

- Yes. Analyze and document how the WEM is in conformance with the RMP and identify the plan decision (including goals, objectives, or desired outcomes) supported by the proposed WEM. If existing NEPA analysis requires supplementation, prepare appropriate NEPA analysis.
- If the proposed WEM is not in conformance with the RMP, either amend your plan or deny the WEM.

**How to document WEMs requests and decisions?**

The BLM receives WEM requests both formally (in writing) and informally (verbally and by email). To determine long-term tracking needs, a workbook is posted on the National Surface SharePoint site where all State/Field Offices will track requests and their decisions for WEMs quarterly, including those requests which are only informally discussed and are not pursued by the operator. The tracking workbook was created from existing checklists being used by Field Offices to review and process these requests to address recommendations made by the Government Accountability Office (GAO) in their [GAO-17-307](#) report, entitled, “Oil and Gas Development: Improved Collection and Use of Data Could Enhance BLM's Ability to Assess and Mitigate Environmental Impacts.” These electronic form(s) and any other relevant documentation need to be printed out and maintained in the official casefile record for the well or lease file, as appropriate. AFMSS must also be updated accordingly.

**For further WEM information, refer to the following documents:**

- [2007 Onshore Oil and Gas Order Number 1](#), Section XI Waivers, Exceptions, or Modifications.
- BLM Planning for Fluid Mineral Resources Handbook, [H-1624-1](#), Chapter IV.C.2 and 3.

- BLM Land Use Planning Handbook, [H-1610-1](#), Section VI (H)(Maintenance); Section VII (B)(Amendment); and Appendix C (H)(Fluid Minerals).
- BLM National Environmental Policy Act Handbook, [H-1790-1](#), Chapter III, Using Existing Environmental Analysis.
- BLM Noncompetitive Leases Handbook, [H-3110-1](#).
- BLM Competitive Leases Handbook, [H-3120-1](#).
- [43 CFR 3101.1-4](#) (Modification or Waiver of Lease Terms).
- [43 CFR 1610.5-4](#) (Maintenance).
- [43 CFR 1610.5-5](#) (Amendment).
- [Federal Onshore Order Oil and Gas Leasing Reform Act of 1987](#), SEC. 5102(f).
- [Uniform Format for Oil and Gas Lease Stipulations](#), March 1989, Rocky Mountain Regional Coordinating Committee.